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Nos. 791 and 792

In the Supreme Court of the United States

OCTOBER TERM, 1939

SEWELL LEE AVERY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

SEWELL L. AVERY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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No. 792

SEWELL L. AVERY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 23, 52) is a memorandum opinion and therefore not officially reported. The opinion of the Circuit Court of Appeals (R. 87) is reported in 67 F. (2d) 310.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 26, 1933. (R. 89, 99.) A petition for rehearing was denied November 21, 1933. (R. 90, 100.) The petition for certiorari was filed February 16, 1934, and granted March 19, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The taxpayer, who kept his accounts and reported his income on a cash receipts and disbursements basis, owned stock in a corporation which in the preceding November declared dividends payable on or before December 31, but did not receive checks issued in December for the dividends until January 2, following. The questions are:

1. Whether the provisions of the applicable Treasury Regulations relating to the time when dividends are to be returned as income are authorized and valid.

2. Whether, under the circumstances of this case, the dividends were unqualifiedly made subject to the taxpayer's demand in the earlier year under the terms of the applicable Treasury Regulations and constitute income for that year.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, p. 17.

STATEMENT

The facts as found by the Board of Tax Appeals may be summarized as follows (R. 23–28, 52–57):

The taxpayer, a resident of Evanston, Illinois, who reported his income upon a cash receipts and disbursements basis, owned certain shares of stock of the United States Gypsum Company, of which he was president. In November 1924 a resolution was duly adopted by the Gypsum Company declaring certain dividends to be paid "on or before December 31, 1924." (R. 24–25.) On January 2, 1925, the taxpayer received a check for these dividends, in the amount of $266,490.10. (R. 26.) In November 1928 a resolution was duly adopted by the Gypsum Company declaring certain dividends to be paid "on or before December 31, 1928." (R. 25.) On January 2, 1929, the taxpayer received a check for these dividends in the amount of $32,656. (R. 26.) In November 1929 a resolution was duly adopted by the Gypsum Company declaring certain dividends to be paid "on or before December 31, 1929." (R. 25–26.) On January 2, 1930, the taxpayer received a check for these dividends in the amount of $48,984. (R. 26.)

In each case the dividend checks were prepared, signed by the proper officers of the corporation, dated on the last day of the month, and actually mailed out to all stockholders of record on that day, except in the cases of officers and employees, including the petitioner, whose checks were not mailed

out at all, but were held in the treasurer's office until the first day of the following month and then distributed to such officers and employees through the office mail. (R. 27.)

The taxpayer reported the sums of $266,490.10, $32,656 and $48,984 in his income tax returns for the years 1925, 1929 and 1930, respectively. The Commissioner determined deficiencies for the years 1924 and 1929 on the ground that these sums had been constructively received within the meaning of the applicable Treasury Regulations in the years 1924, 1928, and 1929, respectively. The Board of Tax Appeals decided in favor of the Commissioner and the Circuit Court of Appeals affirmed the decision of the Board. (R. 33, 63, 87.)

SUMMARY OF ARGUMENT

I

The Revenue Act provides that items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer. As applied to dividends, the word "received" is not as clear as at first seems, because there are a number of different times at which it may reasonably be said the taxpayer "received" them. In order to provide a uniform rule and to facilitate the administration of the statute, the Commissioner promulgated a regulation to the effect that dividends are subject to tax when unqualifiedly made subject to the demand of the stockholder.

This provision has been included in every series of Treasury Regulations from 1918 until the present time. Moreover, the statute to which the regulation refers has been substantially reenacted, which amounts to legislative approval of the administrative construction.

The Revenue Act of 1921 incorporated the regulation in Section 201 (e), and the taxpayer contends that the omission of Section 201 (e) from the Revenue Act of 1924 and from the subsequent Revenue Acts rendered the regulations under those Acts invalid, but the legislative history conclusively shows that the reason for the omission was that the provision was considered unnecessary, and that it was the intention of Congress to tax dividends when subject to demand by the taxpayer even though not actually received in cash.

II

The question as to whether the dividends were unqualifiedly made subject to the taxpayer's demand in the taxable years is essentially a question of fact. The Board of Tax Appeals found as a fact that such dividends were made unqualifiedly subject to the taxpayer's demand, and the evidence supports this conclusion. This finding was approved by the Circuit Court of Appeals, and in the absence of clear error such finding will be accepted by this Court.

ARGUMENT

I

THE PROVISIONS OF THE APPLICABLE TREASURY REGULATIONS RELATING TO THE YEAR IN WHICH DIVIDENDS ARE SUBJECT TO TAX ARE VALID

Section 213 (a)[1] of the Revenue Act of 1924 (*infra*, p. 17) provides that the amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer. The word "received" in this statute is not always easy of interpretation but the Commissioner of Internal Revenue has given it a definite interpretation as applied to dividends by the promulgation[2] of Article 52 of Treasury Regulations 65[3] relating to the Revenue Act of 1924, *infra*, p. 17. This regulation provides in part as follows:

> Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder.

It is respectfully submitted that this regulation has the force and effect of law under the decision of this Court in *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349, where the Court said:

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[1] Section 42 of the Revenue Act of 1928, c. 852, 45 Stat. 791, is substantially the same.

[2] Pursuant to the authority vested in him by Section 1001 of the Revenue Act of 1924, *infra*, p. 17. Section 62 of the Revenue Act of 1928 is substantially the same.

[3] Article 1541 of Regulations 65, *infra*, p. 18, and Articles 333 and 621 of Regulations 74, relating to the Revenue Act of 1928, contain substantially the same provision.

> It is settled by many recent decisions of this Court that a regulation by a department of government addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision.

The above mentioned provision relating to the time when dividends are subject to tax has been included in every edition of the Treasury Regulations from 1918 until the present time.[4] Moreover, Section 213 (a) of the Revenue Act of 1924, to which the regulation refers, was reenacted without material change in the Revenue Act of 1926,[5] the Revenue Act of 1928,[6] and the Revenue Act of 1932.[7] The reenactment of the statutory provision without material change must be deemed to constitute legislative approval of the administrative construction. *Brewster* v. *Gage,* 280 U.S. 327, 337; *Burnet* v. *Thompson Oil & Gas Co.,* 283 U.S. 301, 307–308; *Murphy Oil Co.* v. *Burnet,* 287 U.S. 299, 307; *United States* v. *Dakota-Montana Oil Co.,* 288 U.S. 459, 466; *Burnet* v. *Brooks,* 288 U.S. 378, 392–393. "Courts are slow to disturb the settled administra-

[4] Regulations 45, Article 54; Regulations 62, Article 63; Regulations 65, Article 52; Regulations 69, Article 52; Regulations 74, Article 333; Regulations 77, Article 333.

[5] Section 213 (a) (U.S.C. App., Title 26, Sec. 954).

[6] Section 42.

[7] Section 42 (U.S.C. Sup. VII, Title 26, Sec. 42).

tive construction of a statute long and consistently adhered to." *Alaska Steamship Co.* v. *United States,* 290 U.S. 256, 262.

The Revenue Act of 1921 incorporated substantially the provisions of the above mentioned regulation in Section 201 (e), which is set forth in a footnote to Appendix B (*infra,* p. 19). The taxpayer argues that the omission of Section 201 (e) from the Revenue Act of 1924 and subsequent Revenue Acts rendered the Treasury Regulations relating to the time when dividends were subject to tax under those Acts invalid. In support of this argument he relies upon the decision of the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Adams,* 54 F. (2d) 228, in which the court intimated that the regulation in regard to the constructive receipt of dividends was void because it was in conflict with the express language of Section 213 (a). The court refused to consider the legislative history of the statute, although this Court apparently regards the legislative history as helpful in ascertaining the intention of Congress. *U.S. Cartridge Co.* v. *United States,* 284 U.S. 511, 516-517; *United States* v. *Dakota-Montana Oil Co., supra,* at p. 463.

In the Revenue Act of 1918, Section 201 is silent as to the year in which dividends should be included in gross income. But Article 54 of Treasury Regulations 45 provides that "Dividends on cor-

porate stock are subject to tax when set apart for the stockholder, although not yet collected by him." Section 201 (e) of the Revenue Act of 1921, c. 136, 42 Stat. 227, provided that a taxable distribution made by a corporation to its shareholders should be included in the gross income of the distributees as of the date when the cash was unqualifiedly made subject to their demands. According to the House committee report,[8] the purpose of inserting this provision was to clarify a minor obscurity, but the Senate committee report[9] states that the provision was in accord with the decisions of the courts and was well established in departmental practice.

The committee reports relating to Section 213 (a) of the Revenue Act of 1924, extracts from which are set forth in Appendix B (*infra*, p. 19), show conclusively that the reason Section 201 (e) of the Revenue Act of 1921 was omitted from the Revenue Act of 1924 was that the rule laid down in Section 201 (e) of the Act of 1921 would be followed without an express statutory provision. It appears that Section 213 (a) of the House draft of the Revenue Bill of 1924 provided generally that items of gross income should be considered to be received in the taxable year in which they were unqualifiedly made subject to the demands

[8] H.Rep. No. 350, 67th Cong., 1st Sess., p. 9.

[9] S. Rep. No. 275, 67th Cong., 1st Sess., p. 10.

of the taxpayer. The Ways and Means Committee said in their report that the rule would be followed without an express statutory provision. The Senate struck out the provision, because the rule would be followed in the absence of a statutory provision, and the House accepted the amendment. The Conference Report shows that it was the intention of Congress to require dividends, bond interest, and salaries, such as drawing accounts, to be included in income *when subject to demand by the taxpayer even though not actually received in cash by him,* and that the new provision was considered unnecessary.

In *Shearman* v. *Commissioner,* 66 F. (2d) 256, a case arising under the Revenue Act of 1928 and similar in all respects to the instant case, the Circuit Court of Appeals for the Second Circuit said (p. 258):

> Added assurance that Congress did not intend to change the requirement that dividends unqualifiedly made subject to the taxpayer's demands were to be included in the return for the period within which they were made so is found in the reports of the committees when section 201 (e) of the Act of 1921 was omitted from the Act of 1924. H.Rp. 179, 68th Cong. 1st Sess. pp. 12, 20, 21; S.Rep. 398 68th Cong. 1st Sess. p. 23; H.Conf.Rep. 844, 68th Cong. 1st Sess. pp. 16, 17. These reports clearly show that the

> administrative practice was considered to be well settled and to be in accord with the statute as re-enacted. With such persuasive evidence of the intent of Congress, we hold that T. R. 74, arts. 333 and 621 are valid.

If the taxpayer's argument is sound and Sections 213 (a) and 42 of the Acts of 1924 and 1928, respectively, do not permit the doctrine of constructive receipt, then a taxpayer would be able to manipulate his income from dividends by failing or refusing to reduce it to possession until it suited him to do so. Such a result would not be compatible with a system based upon yearly gains and losses. See *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, 363.

II

UNDER THE CIRCUMSTANCES OF THIS CASE THE DIVIDENDS WERE UNQUALIFIEDLY MADE SUBJECT TO THE TAXPAYER'S DEMAND AT THE TIME WHEN THEY WERE PAYABLE UNDER THE TERMS OF THE APPLICABLE TREASURY REGULATIONS

Articles 52 and 333 of Treasury Regulations 65 and 74, respectively (*infra*, pp. 17–18) provide that dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder. The Board of Tax Appeals decided that under the circumstances of this case, the dividends in question were unqualifiedly made sub-

ject to the taxpayer's demands on December 31 of the years involved. The Board said (R. 33, 62):

> On the facts before us we are of the opinion that the dividends were receivable by the petitioner on the dates payable. Being thus receivable on such dates they were constructively received by the petitioner during the taxable years in controversy and therefore were subject to tax in such years.

Under the theory of the petitioner, if a stockholder accepted his check for dividends on the last day of the calendar year, he would be required to return such dividends in his income for that year, while the stockholder who allowed his check to remain in the treasurer's office until the first business day of the following year would not return the same as a part of his income until the following year.

Again, if the corporation saw fit to mail out the checks for dividends in time for all stockholders living in the same city to receive their checks on the last day of the month, and those living farther away to receive theirs on the first business day of the next succeeding month, we would have different stockholders in the same corporation returning dividends for taxes in different years. The effect of this ruling might be to impose unequal tax burdens on different stockholders in the same corporation. The law contemplates no such discrimination. To adopt the rule announced by the court below holding the dividends to be income when made available

to the stockholder, would establish uniformity in the application of the statute and carry out the intent of the Congress in its adoption.

Inasmuch as the question whether a dividend is unqualifiedly made subject to the demand of the stockholder purports to be a question of fact, the Board's decision is conclusive if there is evidence to support it. The resolution of November 1924 provides that amounts equivalent to the various dividends be transferred to the dividend account and be paid *on or before* December 31, 1924. (R. 24–25.) The resolutions of November 1928 and November 1929 were similarly worded. (R. 25–26.) The dividend checks were mailed on the last day of the month, except in the case of officers and employees, including the taxpayer, where the checks were not mailed but were held in the treasurer's office until the first business day of the following month and then distributed through the office mail. (R. 27.) This evidence indicates that the corporation had funds available on December 31 with which to pay the dividends, and if the taxpayer had demanded the dividends on that day he would have received them.

The court below considered the evidence and adopted the finding made by the Board that the dividends were unqualifiedly made subject to the demands of the taxpayer in the years 1924 and 1929.

Such findings will be accepted by this Court in the absence of clear error. *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U.S. 548.

In *Commissioner* v. *Bingham*, 35 F. (2d) 503 (C.C.A. 6th), certiorari denied, 281 U.S. 729, it was held that a dividend is unqualifiedly made subject to the taxpayer's demand at the time that it is payable. In that case the court said (p. 504):

> The dividend was declared and payable in 1922. It follows, therefore, that the respondent immediately and before the expiration of the year 1922 became a creditor of the corporations. * * * As a creditor, he had a right to demand his debt in money, for debts are payable in money. In other words, the cash was subject to his demand. The corporations were then liable. He was not required to take the checks even when issued, for they were not payment as a matter of law. That the checks were issued is relevant only as emphasis upon the proposition that at that time the cash was admittedly and unqualifiedly subject to the respondent's instant demand. * * * That it was not convenient and was perhaps physically impossible for him to appear at the offices of the various corporations before the year closed and demand the cash did not destroy his legal right to do so.

Inasmuch as the dividends in the instant case were declared in November and payable *on or before* December 31, the case is stronger than either the *Bingham* or the *Shearman* case. The resolution having provided that the dividends should be

paid on or before December 31, the Board correctly decided that they were unqualifiedly made subject to the demands of the taxpayer in the year that they were payable, regardless of when they were actually received by the taxpayer.

In the *Adams* case, upon which the taxpayer relies, the resolution of the board of directors was worded differently and expressly provided that checks for the dividends were *to be mailed* on December 31, 1928. In the *Shearman* case the court pointed out this distinction (p. 258):

> They were not payable by checks to be mailed as were the dividends considered in *Commissioner* v. *Adams,* (C.C.A.) 54 F. (2d) 228, and perhaps that case differs from this in that the taxpayer was there entitled to receive the dividends only at such time as checks mailed were delivered. Here the time when the taxpayer was entitled to receive the dividends was definitely fixed by the resolution to be at the close of business on a day within the 1928 taxable period. The moment when the taxpayer was entitled to the use and benefit of them without qualification was not, as in the Adams Case, only after the time necessary for transmission of checks by mail had expired. This being so, the taxpayer was bound to return them as income in her return for 1928.

CONCLUSION.

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted,

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APRIL, 1934.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 213. For the purposes of this title, except as otherwise provided in section 233—
>
> (a) The term "gross income" includes gains, profits, and income * * *. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period. (U.S.C., Title 26, Sec. 954.)
>
> SEC. 1001. The Commissioner, with the approval of the Secretary, is authorized to prescribe all needful rules and regulations for the enforcement of this Act. (U.S.C., Title 26, Sec. 1245.)

Sections 42 and 62 of the Revenue Act of 1928, c. 852, 45 Stat. 791, are substantially the same as the provisions of the Revenue Act of 1924 quoted above.

Treasury Regulations 65, relating to the Revenue Act of 1924:

> ART. 52. *Examples of constructive receipt.*—* * * Dividends on corporate stock are subject to tax when unqualifiedly

made subject to the demand of the stockholder. * * *

ART. 1541. *Dividends.*—* * *

A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. See article 52.

Articles 333 and 621 of Treasury Regulations 74, relating to the Revenue Act of 1928, contain substantially the same provisions as Articles 52 and 1541 of Treasury Regulations 65, just quoted.

APPENDIX B

Extracts from Committee Reports showing reasons for omitting from the Revenue Act of 1924, Section 201 (e) of the Revenue Act of 1921.[10]

H. Rep. No. 179, 68th Cong., 1st Sess., pp. 12, 20–21:

> Subdivision (e) of the present law is omitted in this bill, but is covered by a general provision in Section 213 (a) of the bill.
>
> * * * * *
>
> It is provided in section 213 (a) that items of gross income shall be considered to be received in the taxable year in which they are unqualifiedly made subject to the demands of the taxpayer. This is a general provision which corresponds to the narrow provisions of Section 201 (e) of the existing law and merely states in the statute the rule which would be followed without an express statutory provision.

S. Rep. No. 398, 68th Cong., 1st Sess., p. 23:

> Section 213 (a): A new sentence has been added to the definition of gross income, pro-

[10] Section 201 (e) of the Revenue Act of 1921, c. 136, 42 Stat. 227, provides as follows:

> For the purposes of this Act, a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands.

Section 213 (a) of the Revenue Act of 1921 expressly refers to Section 201 (e) as an exception to the rule in regard to the receipt of income.

viding that items of gross income shall be considered to be received in the taxable year in which they are unqualifiedly made subject to the taxpayer's demands. This is a statutory enactment of the rule followed by the department, as well as a more general application of a similar provision in section 201 (e) of the existing law.

H. Conference Rep. No. 844, 68th Cong., 1st Sess., pp. 16–17:

Amendment No. 43: The House bill provided that items of gross income should be considered to be received in the taxable year in which they are unqualifiedly made subject to the demands of the taxpayer. This provision was designed to require dividends, bond interest, and salaries such as drawing accounts, to be included in income when subject to demand by the taxpayer even though not actually received in cash by him. Since this is the rule which is and should be followed in such cases in the absence of a statutory provision, the Senate amendment strikes out the provision; and the House recedes.